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No. 88-1148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHNNY M. SHORT,
Cross-Petitioner,

VS.

KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7,
Cross-Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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PROSPECTIVE APPLICATION OF THE COURT'S JUDGMENT BELOW IS BASED UPON FACTORS RECOGNIZED AND APPROVED BY THIS COURT AND IS NOT VIOLATIVE OF THE SUPREMACY CLAUSE.

Statutory or judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins a decision recognizing the doctrine of nonretroactivity. *Lemon v. Kurtzman,* 411 U.S. 192, 199 (1973). A statute which is later

declared unconstitutional is not absolutely void, but is a practical reality upon which people rely, and courts recognize that reality until that statute is found to be unconstitutional. State officials, including school boards of education, have a duty and are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful. *Id.* at 209.

Unquestionably, the Board of Education of Kiamichi Area Vocational-Technical School District No. 7 (hereinafter "School Board") relied upon the Oklahoma teacher termination statutes, particularly Okla. Stat. tit. 70, §6-103.4(B) (1981), in full force and effect on April 2, 1985, when the decision was made to non-renew Mr. Short's teaching contract. At that time, the statute had not been subjected to constitutional scrutiny, but did define the procedures for boards of education and administrative personnel to follow in teacher non-renewal and termination proceedings. That particular statute was not ruled unconstitutional until July 19, 1988, when the Oklahoma Supreme Court, in a split decision, handed down its opinion in *Short v. Kiamichi Area Vocational-Technical School District No. 7 of Choctaw County,* 761 P.2d 472 (Okl. 1988), and then denied rehearing on September 13, 1988. The determination that the Oklahoma statute would not pass constitutional muster based upon this Court's decision in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), was made more than three years after the School Board's decision affecting Short. In declaring this statute unconstitutional, the Oklahoma Supreme Court determined that its holding was to be applied prospectively only, after

considering the factors critical in making such a determination as enunciated in *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971).

Mr. Short now argues that the prospective effect given the decision is in violation of the Supremacy Clause in that this Court's decision in *Loudermill,* affording public employees a pre-termination hearing, was promulgated two weeks prior to the School Board's decision to non-renew Short's contract. While superficially appealing, this argument cannot survive close analysis as it overlooks basic principles and equities which this Court has long recognized.

A court is to apply the law in effect at the time of its decision. *Bradley v. School Board of City of Richmond,* 416 U.S. 696 (1974). While the School Board respectfully submits that the Oklahoma Supreme Court misapplied the *Loudermill* decision as set forth in its Petition for Certiorari filed December 12, 1988, U.S. Supreme Court case 88-974, the School Board nevertheless acknowledges the Oklahoma Supreme Court recognized the factors pertinent to its consideration of the effect of its decision — to declare in 1988 the 1981 Oklahoma statute unconstitutional. It is for the court to determine whether a state statute is constitutional or unconstitutional upon its consideration of recent decisions of the United States Supreme Court — not a state school board.

Here, the School Board was required to follow the laws and procedures as provided by the Oklahoma Legislature in effect at the time the action took place. Short does not now contend the Board did not follow the Oklahoma law in effect in 1985.

The *Loudermill* decision related to an Ohio statute which allowed termination *before* a due process hearing and *without* pay. The Oklahoma statute, Okla. Stat. tit. 70, §6-103.4(B)(1981) provided for *continued pay and benefits* (continued property interest) during the full due process hearing before a hearing panel and *before* termination and loss of pay, if any, would take effect.

Contrary to Short's claim, *before* Short was terminated, this Court's decision in *Loudermill* was specifically brought to the attention of the due process hearing panel and the panel determined that *Loudermill* "*does not* apply" because of the material differences between the Ohio statute in *Loudermill* and the subject Oklahoma statutes which the School Board and hearing panel were obliged to follow.[1] This finding and Order of the hearing panel was then approved by the Oklahoma State District Court[2] before Short's appeal to the Oklahoma Supreme Court.

Short's argument in essence demands that boards of education be clairvoyant. Not only does Short insist that boards of education, comprised of laypeople, be cognizant of very recent United States Supreme Court decisions, but additionally would require those laypeople to anticipate that the decision would then be interpreted by a state court to hold a statute unconstitutional. The unreasonableness of this position is patently clear. As Justice Powell pointed out in his concurring and dissenting

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[1] Petition for Certiorari, U.S. Supreme Court, Case Number 88-974, Appendix C, III, Conclusions of Law, para. 3.

[2] Petition for Certiorari, U.S. Supreme Court, Case Number 88-974, Appendix B, Decision of District Court of Choctaw County, Oklahoma.

opinion in *Wood v. Strickland,* 420 U.S. 308, 329 (1975), a case involving an action of an Arkansas school board, it is probably too much to expect that local officials will know what the law is relative to constitutional rights since the courts are not, by any means, in unanimous agreement in this respect. While *Wood* addressed the issue of qualified immunity and what are "clearly established" constitutional rights, Justice Powell said:

> The court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights . . . one need only to look to the decisions of this court — to our reversal, our recognition of evolving concepts, and our five-to-four splits — to recognize the hazards of even informed prophecy as to what are 'questioned constitutional rights.'

Even the majority in *Wood* did not charge school board members with "predicting the future course of constitutional law." *Id.* at 322.

Here, the Oklahoma Supreme Court did not unanimously agree upon the application of *Loudermill* to Oklahoma's Teacher Termination Statute. Justice Simms in a strongly worded dissent found the majority's reliance on *Loudermill* to be misplaced as that action was clearly distinguishable and not controlling. The School Board had no "clear warning" that it was voyaging into a potentially unconstitutional arena when the decision was made to non-renew Short's contract, pursuant to Okla. Stat. tit. 70, §6-103.4(B)(1981). Two weeks after this Court's

decision in *Loudermill,* it could not be foretold that that decision would ultimately render Oklahoma's teacher termination statute unconstitutional, and that the School Board's reliance on that statute was unjustified.

In *Lemon v. Kurtzman,* 411 U.S. at 207, this Court noted succinctly — governments must act if they are to fulfill their high responsibilities. The Court would not hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. This type of position could seriously undermine the initiative of state legislators and executive officials alike. Until judges say otherwise, state officers have the power to carry forward the directives of the state legislature. ". . . One of the first principles of constitutional adjudication is the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, at 60 (1973) (Stewart, J., concurring). *Id.* at 208. State officials, particularly boards of education comprised of volunteer laypeople, should be entitled to rely on a presumptively valid state statute, until adjudicated otherwise.

The Oklahoma Supreme Court acknowledged that once it determined due process required tenured teachers facing either termination or non-renewal be afforded a pretermination opportunity to be heard, it must also determine the effect of that ruling. The Constitution neither prohibits nor requires that retrospective effect be given to any new constitutional rule. The

federal Constitution has no voice upon the subject of retrospectivity. Courts are free to determine, as a matter of policy, the effective date of new rulings. *Linkletter v. Walker,* 381 U.S. 618 (1965); *Great Northern Railroad Company v. Sunburst Oil and Refining Company,* 287 U.S. 358 (1932).

The Oklahoma Supreme Court in determining the application of its ruling analyzed and applied the factors listed in *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971). These include: (1) the purpose of the new rule, (2) the extent of reliance on old doctrine; and (3) the burden likely to be imposed on administering legal process due to additional litigation or curative actions. After a careful weighing of the three factors of purpose, reliance, and burden, the Oklahoma Supreme Court determined that its ruling should be given prospective effect only to all cases occurring after the mandate was issued.

This doctrine of nonretroactivity serves to reconcile legal interest in a new rule of law with a reliance interest founded upon a pre-existing rule of law. *Wainwright v. Stone,* 414 U.S. 21 (1973). In appropriate cases, a court may in the interest of justice make a rule prospective, and there is much to be said in favor of such rule for cases arising in the future. *Linkletter v. Walker,* 381 U.S. 618 (1965).

While the School Board contends the Oklahoma Supreme Court's decision applies *Loudermill* incorrectly, the prospective effect of that decision is proper, if it is upheld. Yet Short now

contends in his Cross-Petition for Certiorari that application of the Oklahoma Supreme Court's pronouncement is incorrect, and that it must be made retroactive, at least as to him, as only then can he have any prospect for relief.

With any ruling made effective prospectively only, the new ruling does not apply even to the parties before the court. That fact alone is insufficient to divest a court of jurisdiction and is not adequate grounds to grant certiorari. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964). The fact the ruling is given prospective effect does not mandate a certain grant of certiorari on the matter.

CONCLUSION

Short's argument that the Oklahoma Supreme Court's determination that its decision is to be applied to future cases only is a violation of the Supremacy Clause is ill-founded. The Kiamichi School District and Board of Education could not have anticipated that the two week old ruling in *Loudermill* would ultimately be interpreted to render the state statute upon which they relied unconstitutional. The state officials were entitled to rely on the presumptively valid statute. Any other decision would render officials paralyzed while duly enacted legislation awaits favorable judicial countenance. Fault, if any, may be found in proceedings conducted in adherence to that statute alone only *after* the Oklahoma Supreme Court's mandate has issued.

For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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